G.L. Milliken Plastering *and* Local 9, International Union of Bricklayers and Allied Craftworkers, AFL–CIO *and* Local 67, Operative Plasterers' and Cement Mason's International Association of the United States and Canada, AFL–CIO, Intervenor Local 67 and Local 16, Operative Plasterers' and Cement Mason's International Association of the United States and Canada, AFL–CIO, Intervenor Local 16. Case 7–RC–22439

November 28, 2003

DECISION ON REVIEW AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On May 9, 2003, the Acting Regional Director for Region 7 issued a Decision and Order in which he dismissed the instant petition, finding it barred by a collective-bargaining agreement between the Employer and Local 16, Operative Plasterers and Cement Masons International Association of the United States and Canada, AFL-CIO (Local 16). Pursuant to Section 102.67 of the National Labor Relations Board's Rules and Regulations, the Petitioner filed a timely request for review of the Acting Regional Director's Decision and Order. On June 11, 2003, the Board granted the Petitioner's request for review.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

After careful consideration of the entire record, including Intervenor Local 16's brief on review, the Petitioner's motion to strike the inclusion of a hearing transcript of a related case from Local 16's brief, and Local 16's response, we find, contrary to the Acting Regional Director, that an election should have been ordered in a proper residual unit of the Employer's unrepresented plasterers. We therefore remand this case to the Regional Director to determine the proper residual unit for an election.

Facts

This case represents yet another entry in a long-running dispute between the Bricklayers and the Operative Plasterers unions. In 1998, the Operative Plasterers unilaterally revoked its agreement with the Bricklayers regarding limitations on their respective geographical jurisdictions. This move was upheld by the AFL–CIO in July 2000 and was the catalyst for a number of petitions from both the Plasterers and the Bricklayers seeking to expand their relationships to include units in geographical areas not given to them under their pre-1998 agreement.

Here, Petitioner seeks to represent a unit of plasterers employed at the Employer's Chelsea, Michigan facility. The Employer is a member of the Washtenaw Contractors Association (WCA), and since 1997, through the WCA, has been a party to a Section 8(f) prehire agreement with the Petitioner. The WCA 8(f) agreement covers work performed in certain limited areas in Michigan, including all of Washtenaw County (where the Employer's Chelsea facility is located) and eight townships in Livingston County.

The Employer and Local 16 entered into a Section 9(a) collective-bargaining agreement effective by its terms from June 2, 2000 through May 31, 2004 covering plastering work in the Lansing/Jackson area (Lansing/Jackson Agreement).[1] The geographic coverage of the Lansing/Jackson Agreement does not embrace the Employer's Chelsea location. At the hearing, Local 16 introduced the executed signature page but failed to introduce the entire Lansing/Jackson Agreement. The introduced signature page included article XV stating, in relevant part, that the parties agree to abide by the 2002–2004 collective-bargaining agreement between Local 16 and the Lansing/Jackson Area Plasterers Contractors. This page was apparently identical, except for the signatures, to the last page of the full contract entered into evidence earlier that day in a related case.[2]

The Acting Regional Director found that Local 16 had a 9(a) agreement with the Employer covering work in the Lansing/Jackson areas and in the Flint area by operation of the Lansing/Jackson contract's traveler clause.[3] Based on this 9(a) finding, the Acting Regional Director found the instant petition barred and denied the Petitioner's request to run an election in a residual unit, seeing "no reason to perpetuate a geographic division of plasterers into separate units by ordering an election in those counties which are not covered by the contract." On review, the Petitioner contends that (1) the Acting Regional Director erred in finding a contract bar because Local 16 failed to introduce the full agreement at the hearing, (2) the contract cannot serve as a bar because its geographi-

[1] The Lansing/Jackson contract contains a "traveler clause" which Intervenor Local 16 asserts binds the Employer to the terms and conditions of a purported 9(a) agreement between the Flint Area Contractors and Local 16 for the Employer's employees working in the Flint area (Flint Agreement). We note that the Flint Agreement does not cover Washtenaw County.

[2] *Spray On Fire Proofing, Inc.*, 7–RC–22435.

[3] No party disputes this 9(a) finding. Accordingly, the issue of whether the contracts' recognition clauses are enough, standing alone, to create a valid 9(a) relationship is not before us.

cally-limited unit is inappropriate, and (3) even if there is a contract bar, it should only extend to the areas covered by the agreement and an election should be run in a residual unit. As explained below, we conclude that the instant case should be remanded to the Regional Director.

ANALYSIS

Where a portion of a work force is already organized, the Board evaluates subsequent petitions to represent remaining employees first to determine whether the petitioned-for employees share a community of interest apart from the represented unit employees. See *Carl Buddig & Co.*, 328 NLRB 929 (1999). If the community of interest is not separate and distinct such that they are not an appropriate separate unit, the Board looks to whether they are an appropriate residual unit. Id. A residual unit is appropriate "if it includes all unrepresented employees of the type covered by the petition." Id. (quoting *Fleming Foods*, 313 NLRB 948, 949 (1994)).

Here, the Petitioner does not allege that the petitioned-for plasterers share a sufficient community of interest separate and apart from those represented by Intervenor Local 16 such that they constitute a separate appropriate unit. Rather, it requests a residual unit of all unrepresented plasterers. However, on the present record, we cannot ascertain if the petitioned-for unit includes all of the Employer's unrepresented employees.

In finding that the Lansing/Jackson Agreement barred the petition outside of its coverage area, the Acting Regional Director relied on the Board's decision in *Pontiac Ceiling & Partition Co.*, 337 NLRB 987 (2001), where the Board affirmed the dismissal of a Bricklayers petition based on a Plasterers 9(a) contract. However, in that case the barring contract covered the area in which the Bricklayers sought an election. As such, the petition was clearly barred. Here, at the hearing the Petitioner requested a residual unit, expressly omitting the area covered by the Lansing/Jackson Agreement.

However, that omission does not resolve all of the issues in this case. As noted, the Lansing/Jackson Agreement contains a "traveler clause." That clause requires (1) that if the Employer performs work in an area covered by a Local 16 or another Operative Plasterers contract that it be bound to that contract notwithstanding the fact that the Employer is not a signatory to such agreement and (2) that if the Employer performs work in an area not covered by an Operative Plasterers agreement that the terms and conditions of the Lansing/Jackson Agreement apply. Thus, despite that fact that the Lansing/Jackson Agreement's coverage is limited to a specific area, it is possible that, by application of the traveler clause, it applies to a wider area. It is this potential broader application which raises questions regarding contract bar and the scope of a residual unit.[4] That is, if the claimed residual unit includes employees who, by virtue of the traveler clause are covered by the Lansing/Jackson Agreement, the petition may be contract-barred. Conversely, if there are travelers who are not covered by the traveler clause, and the petition nonetheless excludes these travelers, the unit may be for an incomplete residual unit. We leave these questions for the Regional Director's initial determination on remand.

Accordingly, we remand this case to the Regional Director to reopen the record to establish whether the application of the traveler clause bars the petition and the proper scope of the residual unit, if any.[5]

Dated, Washington, D.C., November 28, 2003

Robert J. Battista, Chairman

Peter C. Schaumber, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[4] Despite the Petitioner's arguments to the contrary, we agree that the Lansing/Jackson Agreement's limited coverage area does not affect its bar quality with respect to the geographic area in which it applies. Petitioner relies on *Alley Drywall, Inc.*, 333 NLRB 1005, 1007 (2001), for the proposition that the Board rejected such geographically limited units. However, in that case the Board rejected the use of 8(f) bargaining history to limit a petitioned-for unit. Here, no one challenges the fact that the Employer and Local 16 have enjoyed a 9(a) relationship since June 2002. We see no reason why this bargaining history, albeit short, is insufficient to find that Local 16's existing unit embodied in its undisputed 9(a) agreement is appropriate for contract bar purposes.

[5] Because we are directing the Regional Director to reopen the record, we find it unnecessary to pass on the Petitioner's arguments that the introduction of the Lansing/Jackson Agreement's executed signature page was inappropriate under our recent decision in *Waste Management of Maryland, Inc.*, 338 NLRB No. 155 (2003), and that Local 16 improperly included the record in *Spray on Fire Proofing, Inc.* in its brief on review. In determining the proper residual unit, the Regional Director must analyze the Lansing/Jackson Agreement, the traveler clause, and the Flint Agreement. Accordingly, we direct the parties to introduce the full contracts alleged to bar the petition.